

FEDERAL COURT OF AUSTRALIA

MIGRATION - Preferential Relative Visa - whether applicant for visa, despite divorce, still “in a de facto relationship” - if so, existence of such a relationship constituted a disqualification from obtaining such a visa - requirement of relevant regulation that Minister be satisfied that the parties have a mutual commitment to a shared life as husband and wife to the exclusion of all others and that the relationship between them is genuine and continuing - Tribunal found that applicant and “husband have had contact and are still in a continuous relationship together” - no reference to mutual commitment to a shared life to the exclusion of all others - whether Tribunal erred in law by failing to ask the right questions - whether Tribunal otherwise provided a fair and just mechanism of review or acted according to substantial justice - whether it would be futile to remit the matter to the Tribunal for further consideration.

Migration Act 1958 (Cth) ss 346, 353, 363 420, 476
Migration Regulations 1989 reg. 1.15A

Suk Hong Yoon v Minister for Immigration and Multicultural Affairs (Federal Court of Australia, Branson J, unreported 20 February 1988), distinguished
Minister for Immigration, Local Government and Ethnic Affairs v Dhillon (Federal Court of Australia, Full Court, unreported, 8 May 1990), referred to
Chand v Minister for Immigration and Multicultural Affairs (1996) 44 ALD 583, referred to
Rahim v Minister for Immigration and Ethnic Affairs (Federal Court of Australia, Sackville J, unreported, 28 August 1997, Judgment No 884 of 1997), distinguished
Yuk Shan Cheung v Minister for Immigration and Ethnic Affairs (Federal Court of Australia, Einfeld J, unreported, Judgment No 1343 of 1997) distinguished

**DIEN LOAN TRAN v MINISTER FOR IMMIGRATION AND
MULTICULTURAL AFFAIRS**

No. VG 601 of 1997

**CARR J
MELBOURNE
20 MARCH 1998**

**IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION**

VG 601 of 1997

BETWEEN: DIEN LOAN TRAN
Applicant

AND: MINISTER FOR IMMIGRATION AND
MULTICULTURAL AFFAIRS
Respondent

JUDGE: CARR J
DATE OF ORDER: 20 MARCH 1998
WHERE MADE: MELBOURNE

MINUTE OF ORDERS

THE COURT ORDERS THAT:

1. The decision of the Immigration Review Tribunal dated 2 October 1997 be set aside.
2. The application of Ms Ton Thi My for the grant of a Preferential Relative (Migrant) Class AY Subclass 104 (Preferential Relative) Visa be remitted to the Immigration Review Tribunal (differently constituted) for hearing and determination according to law.
3. The respondent pay the applicant's costs of this application.

NOTE: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

**IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION**

VG 601 of 1997

BETWEEN: DIEN LOAN TRAN
Applicant

AND: MINISTER FOR IMMIGRATION AND
MULTICULTURAL AFFAIRS
Respondent

JUDGE: CARR J
DATE: 20 MARCH 1998
PLACE: MELBOURNE

REASONS FOR JUDGMENT

INTRODUCTION

The applicant, Mrs Dien Loan Tran, (so described in the proceedings here and elsewhere, but whose correct name is Mrs Tran Dieu Loan), applies for review of a decision of the Immigration Review Tribunal (“IRT”) affirming a decision made by an officer in the Migration Internal Review Office not to grant her daughter and grandson a Preferential Relative Visa.

FACTUAL BACKGROUND

On 22 December 1995 the applicant’s daughter, Ms Ton Thi My, (who was born in Vietnam, is a citizen of that country and is aged 31) applied for a Preferential Relative (Migrant) (Class AY) Subclass 104 (Preferential Family) visa to migrate to Australia. I shall refer to that visa as “a Preferential Family Visa”. The applicant sponsored her daughter’s application. The applicant was entitled to do that, because she is a permanent resident, having arrived in Australia in 1995. Her only other child, a grown-up son, also lives in Australia. The applicant’s husband died in 1966. On 26 September 1996 a delegate of the respondent at the Australian Consulate General in Ho Chi Minh City, Vietnam refused Ms Ton’s application. That decision was affirmed by the Migration

Internal Review Office on 18 April 1997. Mrs Tran then applied (on 13 May 1997) to the IRT for review of that decision pursuant to s 346 of the *Migration Act* 1958 (Cth) (“the Act”) when read with the definition of “Part 5 Reviewable Decision” in the Act. As I have mentioned, the IRT affirmed the review decision. On 24 October 1997 the applicant lodged in this Court an application to review the IRT’s decision.

THE STATUTORY FRAMEWORK

The criteria for a Preferential Family Visa are contained in Part 104 of Schedule 2 of the Migration Regulations (“the Regulations”). Those criteria were set out at pp 6-9 of the IRT’s reasons. It is not necessary to refer to them in full. For present purposes, it is sufficient to focus on Regulation 1.15(2) which provides in effect that an applicant is disqualified if the applicant or the applicant’s spouse resides in the same country, not being Australia, as an “overseas near relative”. Despite Ms Ton’s claim to have been divorced, the decision-makers to date have held that her “husband” (to whom I shall refer as “Mr Truong”) is still her “spouse” as defined by the Regulations. Mr Truong resided in Vietnam and had “overseas near relatives” in that country. In those circumstances, if Mr Truong was her “spouse” at the relevant times, it is common ground that Ms Ton was disqualified from obtaining a Preferential Family Visa.

The applicant seeks to challenge the IRT’s decision on various grounds, to which I will come in a moment. First, it is important in cases of this type to keep in mind the Court’s function. The Court’s role is to examine the matters specified in the applicant’s grounds of review. It is not the function of the Court to review the merits or decide the facts of the case. The facts are for the maker of the administrative decision, in this case the Immigration Review Tribunal. This Court’s function is to ascertain whether there was anything having the nature of an error of law in the Tribunal’s decision including any error in the approach which it took to deciding the questions before it. In particular (on the present state of the authorities) was there a failure to comply with the requirements of s 353 of the Act (the analogue of s 420) or does any matter otherwise arise under s 476 of the Act?

MS TON’S CLAIMS

Ms Ton was born in Vietnam on 24 December 1966. In her application she stated that she had divorced her husband Mr Truong Van Ti and that she lived with her son. Ms Ton produced a copy of a decision by a Vietnamese Court dated 17 March 1995 to the effect that she and her husband had divorced by consent pursuant to a case commenced in October 1993. That document stated that the child of the marriage was being raised by Ms Ton who requested "no support".

On 24 May 1995 an officer in the respondent's department in Ho Chi Minh City telephoned the Vice-Chief of Police of O Mon Town, O Mon District, Can Tho Province. [Ms Ton's and Mr Truong's divorce decision was "recognised" by the Peoples Court of O Mon.] I reproduce below in full the officer's note of that telephone conversation.

NOTE FOR FILE 95/017625

1. Type of investigation : Actual marital status
2. Contact : Mr: Nguyen Van Tam
Vice chief of policeman of O mon Town
O mon District, Can thi Province
Tel: 071861845 (Can tho)
3. Investigation result: fraudulent
Comment by RSV authority: At 3pm on 24/05/96 I called the police station of O mon town, O mon District, Can tho province at the telephone number : 071861845 and talked to Mr: Nguyen Van Tam, Vice chief of policemen of O mon town. I asked him to check at the time I was talking to him, whether the applicant: Ton Thi My and her husband were living together or not. After checking for two or three minutes, the Policeman answered:
"This couple have been applying migration application [for the USA]. They know that if both of them have been included in the application, they will be refused. So they decided to divorce. And they have legal divorce certificate in about 1994 or 1995, but in fact they are still living together at the same house"
I asked him to make sure about this because it was very important. Mr Tam once more time confirmed what he has said to me as stated above.
Date: 24/05/95 (at 5 pm)

Nguyen Thi Lan

On 12 July 1996 the primary decision-maker (Ms O'Malley) interviewed Ms Ton. Ms O'Malley told Ms Ton that the authorities had advised the Department that Ms Ton was still living with her husband and that she had only obtained a divorce to be eligible for a visa. Ms Ton was invited to comment. Ms Ton denied the allegation. In the record of the primary decision made on 26 September 1996 there appeared the following:

“In your application you stated that you and your ex-spouse, Truong Van Vi were divorced and that therefore his parents and five siblings in Vietnam could not be considered as overseas near relatives in assessing whether you meet the requirements to be considered a remaining relative. I am prepared to accept this claim so long as I am satisfied that the divorce from your spouse is genuine and not carried out simply so you can meet the requirements for migration to Australia.

A number of factors led to infer that your divorce was not genuine and that for all practical purposes you continued to live with your ex-spouse in a marital relationship:

- . On 24/5/96 this office made routine enquiries to check your actual living circumstances and the genuineness of your divorce from your former spouse. The investigating officer was informed that you continued to live with your ex-spouse continued to live together (sic) and that you had divorced only technically in order to meet the requirements for migration to Australia.*
- . You claimed to have been separated from your ex-husband in 1993 and that you had applied for divorce at that time. However, your divorce was only formalised in March 1995, only 9 months before your application was lodged and you were unable to provide any evidence of the application divorce (sic) or an explanation why the authorities took such an unusually long time to finalise your divorce.*

This information and my adverse inference were put to you for comment and explanation at interview. You were unable to offer a plausible explanation of either of these factors. You maintain that you were telling the truth. In weighing up your claims on the one hand against the factors suggesting that your divorce was not genuine on the other, I prefer the latter because

- . the report of the local authorities confirms my inference and I am of the view that the report was a more dispassionate and disinterested account of your circumstances than the account which you provided (which stood a significant chance of being motivated by your desire to meet the criteria for migration to Australia). You were also unable to offer any explanation as to why the reporting officer would not be telling the truth; and*
- . you were unable to offer a plausible explanation of the timing of your divorce and why it was not motivated by your desire to meet the criteria for migration to Australia.*

On the basis of the factors detailed above I am not satisfied that your divorce was not genuine (sic) and I find that there is a real chance that for all practical purposes you continue to live with TRUONG VAN VI in a marital relationship. Because Truong Van Vi has a number of his or her

spouse overseas near relatives usually resident in Vietnam you are excluded from meeting the definition of a remaining relative as set out in Regulation 1.15.”

[The reference to “a real chance” is puzzling and would be a matter of concern if it had found its way into the subsequent review decisions. However, that would not appear to be the case, particularly in the proceedings before the IRT.]

On review, the reviewing officer gave the following reasons for confirming the primary decision:

“The primary application was refused on the basis that the applicant, although divorced from her husband, lived in a de facto relationship with him.

- The Consulate-General’s office conducted a routine enquiry on 24/5/1996 and were advised by a local authority that the divorce obtained by the applicant was obtained only in order to meet migration criteria and that the applicant and her ex spouse continued to live together.
- At an interview conducted on 12/7/96 at the Australian Consulate-General’s office in Ho Chi Minh City this allegation was put to the applicant who reiterated that she was not living with her husband. However she was not able to offer any plausible explanation as to why this information was provided to the Consulate-General’s office.
- The applicant stated that the divorce was applied for in 1993. In this context I note that the applicant’s mother applied for migration on 23/6/1994. It is therefore reasonable to suspect that the divorce may have been applied for in order to meet migration criteria. At the interview conducted on 12/7/96 the applicant was also asked to provide an explanation as to why the divorce took so long to finalise and why she had no documentation to verify this application as such documentation is normally given to applicants. The applicant advised that she was not given any documentation by the court. The applicant also stated that the case took a long time to finalise as the court was attempting to reconcile the applicant and her husband. She was however unable to recall how often she had been to the court and no documentation was or has been submitted to verify these visits.

Given the foregoing I have strong reservations as to whether the divorce obtained by Ms TON is genuine. In any event if the divorce is genuine she is in a de facto relationship and therefore does not meet the criteria of a remaining relative.”

The IRT held a hearing in Melbourne on 11 September 1997 during which evidence was taken from the applicant and her son. They were accompanied by their legal adviser (a registered migration agent) and an interpreter. Both the applicant and her son gave evidence. The applicant stated that she lived with her daughter, Ms Ton, in Vietnam until

her (the applicant's) departure for Australia in 1995. She said that her son-in-law would stay with them sometimes or "rarely". He went out drinking during the day but would stay at night. This had continued until the divorce in 1995, before the applicant came to Australia. She stated that her son-in-law visited the applicant occasionally, mainly to see his son every 3-5 days. The applicant's son (Ms Ton's brother - Mr Thien) also gave evidence. Mr Thien came to Australia in 1993 but had returned to Vietnam in early 1995 and in March 1997. Mr Thien said that he stayed for a month in Vietnam on the first occasion. He said that his sister and her husband were no longer living together. His brother-in-law would come around to see his son but Mr Thien would not talk to him much as he always smelt of alcohol. Mr Thien was not aware of the divorce at that time but knew of the legal separation. On the second occasion when Mr Thien returned to Vietnam he again stayed with his sister and her son. He said that his brother-in-law returned sometimes to see the son. This was almost every week. He recalled him staying overnight on one occasion because he was too drunk to go home.

Unfortunately, the mistake in the date (24/05/95 instead of 24/05/96) in the Note for File, which I have reproduced above, found its way into the proceedings before the Tribunal. First, when the applicant was giving evidence Mr Karas (the member constituting the Tribunal) asked:

"Could you - do you want to make any comments about the fact that it's recorded that officers from the department contacted the local police where your daughter lives and they were told by a police officer Win Van Than, the policeman in Omon Town, that in 1995 your son-in-law and your daughter were still living together in the same house. I will show you a copy of the note. Have you seen a copy? Your advisers have a copy of the note. There is a copy of the note saying that in May 1995 inquiries were made of the local police people and the information was that your son-in-law and daughter were living together and that in fact they had only gone through the process of obtaining a divorce because she wanted to migrate to Australia but in truth they were still husband and wife and still live together as if they were still husband and wife. Have you any comments? --- Yes, because my daughter doesn't want to disclose the domestic problems to the outsiders, moreover my son-in-law still comes over to visit his son so the people around simply think that they are still living together, moreover my daughter has her own business in Vietnam. She is not in financial hardship at all."

The mistake also found its way into the Tribunal's reasons as the following paragraph discloses:

"A note on the Department's file dated 24 May 1995 reflects a contact by a Department Officer and the Vice-Chief of Police in Omon town that day indicating that the Applicant and her husband were still living together in the same house and that they decided to divorce to be able to migrate. Given the importance of the information the caller had it confirmed by the Policeperson there."

The Tribunal then set out the above passages from the primary decision and the decision on review. It set out some of what it described as "the legislative requirements". It is common ground that some of the regulations (which occupied some four pages) were not the relevant regulations, but that the discrepancies were not material. What I consider to be material was the fact that the Tribunal took the trouble to set out four pages of supposed criteria from the Regulations but neglected to set out the relevant definition of "spouse". This was in the context of a decision which had as its sole basis a finding that Mr Truong was the spouse of Ms Ton. The Tribunal reviewed the evidence given by the applicant and her son. The Tribunal then made the following findings:

"The Tribunal found Mrs Tran and her son to be vague in their evidence. Both lacked credibility and were not convincing. Their explanations regarding the Applicant's situation, her relationship with her "former" husband, the police statement and other matters were not found to be plausible in the circumstances."

While the Tribunal understands the concerns and desires of the family to be together it is not acceptable for them to indulge in untruths and be involved in a pattern of questionable behaviour in their quest for the Applicant to obtain residency here. It appears she has continued to live with her husband contrary to the suggestions made. Many statements regarding her situation have been self-serving and should be given little or no weight by the Tribunal. The false statements regarding the state of her marriage and separation must be taken into account when determining this application. (See eg Singh v Minister for Immigration and Ethnic Affairs) (Federal Court, Sackville J, 6 December 1994, unreported).

The Tribunal prefers the evidence of the police and notes the statements by family members that the son-in-law and the brother-in-law at times stayed at the Applicant's house in Vietnam. Based on the evidence and material before it the Tribunal finds on balance, indeed on a high degree of probability that the Applicant and her husband have had contact and are still in a continuous relationship together. Indeed Mr Thien referred to his seeing his brother-in-law at the Applicant's house in March this year

again.

The Tribunal notes that truthfulness is of fundamental importance in migration matters as stated in Re Lachmaiya and Department of Immigration and Ethnic Affairs (unreported AAT, 8 February 1992, Deputy President McMahon). Consequently at the time of the application in December 1995 the Tribunal finds on balance that the Applicant and her husband were not separated and he was still her “spouse”.

Accordingly, the Tribunal affirmed the review decision.

The definition of “spouse” in the Regulations underwent some change between 26 September 1996 (being the date of Ms Ton’s application and the primary decision) and 2 October 1997 (being the date of the Tribunal’s determination).

At the time of Ms Ton’s application and at the time of the primary decision Regulation 1.15A provided as follows:

“1.15A. (1) For the purposes of these Regulations, a person is the spouse of another person if:

- (a) the 2 persons are:*
 - (i) married to each other under a marriage that is recognised as valid for the purposes of the Act; or*
 - (ii) de facto spouses of each other, as set out in subregulation (2); and*
- (b) the Minister is satisfied that:*
 - (i) the 2 persons have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and*
 - (ii) the relationship between the 2 persons is genuine and continuing; and*
- (c) the Minister is satisfied that the 2 persons are:*
 - (i) living together; or*
 - (ii) not living separately and apart on a permanent basis.*

(2) A person is the de facto spouse of another person:

- (a) if the persons:*
 - (i) are of opposite sexes; and*
 - (ii) are not married to each other under a marriage that is recognised as valid for the purposes of the Act; and*
 - (iii) are not within a relationship that is a prohibited relationship for the purposes of subsection 23B(2) of the Marriage Act 1961; and*
- (b) if:*
 - (i) either of the persons is domiciled in Australia - both of them have turned 18; or*

- (ii) *neither of the persons is domiciled in Australia - both of them have turned 16.*

At the time of the Tribunal's determination the relevant portions of Regulation 1.15A read as follows:

“(1) For the purposes of these Regulations, a person is the spouse of another person if the 2 persons are:

- (a) in a married relationship, as described in subregulation (1A); or*
- (b) in a de facto relationship, as described in subregulation (2).*

(1A) Persons are in a married relationship if:

- (a) they are married to each other under a marriage that is recognised as valid for the purposes of the Act; and*
- (b) the Minister is satisfied that:*
 - (i) they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and*
 - (ii) the relationship between them is genuine and continuing; and*
 - (iii) they:*
 - (A) live together; or*
 - (B) do not live separately and apart on a permanent basis.*

(2) Persons are in a de facto relationship if:

- (a) they:*
 - (i) are of opposite sexes; and*
 - (ii) are not married to each other under a marriage that is recognised as valid for the purposes of the Act; and*
 - (iii) are not within a relationship that is a prohibited relationship for the purposes of subsection 23B(2) of the Marriage Act 1961; and*
- (b) they are of full age, that is:*
 - (i) if either of the persons is domiciled in Australia - both of them have turned 18; or*
 - (ii) if neither of the persons is domiciled in Australia - both of them have turned 16; and*
- (c) the Minister is satisfied that:*
 - (i) they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and*
 - (ii) the relationship between them is genuine and continuing; and*
 - (iii) they:*
 - (A) live together; or*
 - (B) do not live separately and apart on a permanent basis;*

...”

It seems to be common ground that the criteria for a Preferential Family Visa are to be satisfied both at the time of application and at the time of eventual decision, although due to the complexity of the regulatory scheme, that is by no means certain. In any event, neither party contended that there was a material difference between the definition of “spouse” at those different times.

The main thrust of the applicant’s case was that the IRT had erred in law by not considering the regulatory definition of the term “spouse”, and in particular the requirements applicable to persons:

- “married to each other” or “in a married relationship”; or
- persons being “de facto spouses” or “in a de facto relationship”

(the slightly different terminology of the 1994 and 1997 version of the Regulations respectively). Common to each of those relationships was a requirement that the Minister be satisfied that:

- the persons have a mutual commitment to a shared life as husband and wife to the exclusion of all others;
- the relationship between them is genuine and continuing; and
- either they live together or do not live separately and apart on a permanent basis.

The applicant submitted that it simply was not sufficient, as a matter of law, for the Tribunal to conclude as it did (in the passage set out above) that Ms Ton and Mr Truong “have had contact and are still in a continuous relationship together”. The Tribunal should have gone on and asked the questions to which the Regulations required answers. In my opinion, the applicant’s submission is correct. The same applies to the primary decision and the decision made upon review.

It may not have been necessary for the Tribunal to have set out in its reasons the text of Regulation 1.15A. However, given that it took the trouble to set out all the other regulatory requirements for this particular visa, that omission in itself has some significance. The primary decision-maker and, possibly, the review officer had some doubts about the legality of the divorce itself. The Tribunal does not appear to have

decided whether the divorce was a real one in law i.e. recognised by the appropriate court in Vietnam. But that is not the main point; that is very much a subsidiary point illustrating, as I think it does, an approach that was not as careful as it might have been. More seriously, even when categorising what it saw as the relationship between these two persons as being a continuous one, the Tribunal did not measure the evidence of that relationship against the regulatory requirements to which I have referred above. In my view, it simply did not ask itself the right questions. It is clear that when the genuineness of a claimed marriage or de facto relationship determines a person's entitlement either to enter or remain in Australia the tests to which I have just referred are (quite properly) rigorously applied - see *Minister for Immigration, Local Government and Ethnic Affairs v Dhillon* (Federal Court of Australia, Full Court, 8 May 1990 unreported) and *Chand v Minister for Immigration and Multicultural Affairs* (1996) 44 ALD 583. The same approach should be taken, when the existence of a mutual commitment to a shared life, a genuine and continuing relationship and the like, constitutes a disqualification.

One simply searches in vain for any evidence that Ms Ton and Mr Truong had at any relevant time a "mutual commitment to a shared life as husband and wife to the exclusion of all others". In my view, it was not sufficient to rely on a finding of absence of credibility on the part of the applicant and her son and a similar finding against Ms Ton at the primary and secondary levels of the decision-making process. The whole structure of that process rests on the statement from the O Mon Police Station that "... they are still living together at the same house". That, of course, falls far short of the definition found in the Regulations.

In my view, when one takes the fact that the Tribunal did not ask itself the right questions and couples that with the somewhat confused manner in which the Tribunal put the subject matter of the police report to the applicant, not only is error of law disclosed but also the Tribunal can be seen to have failed to provide a mechanism of review that was fair and to have acted otherwise than according to substantial justice, both being requirements of s 353 of the Act. I do not consider that the situation was cured by the Tribunal allowing a short adjournment to enable the applicant to have a look at the Department's file. There are other matters which, on their own, might be regarded as beyond the reach of judicial review and going to the merits or matters of weight. They

included the following:

- the somewhat puzzling reference (in the “Note for File”) to Ms Ton and Mr Truong applying to migrate to the USA. The words “for the USA” were contained in square brackets which makes it unclear whether this information was provided by the police source or inserted by the maker of the note. There was no other evidence that these two persons had applied to migrate to the United States of America;
- the household booklet signed by the Deputy Chief of the Public Security Office of O Mon District showing Ms Ton as the household head and her son as the only other person resident in the household; and
- the officially certified decision of the Peoples Court of O Mon District to recognise the divorce by consent which was preceded by several officially-certified documents in the nature of summonses from the Peoples Court of O Mon to attend sessions of reconciliation.

It might well be that the Tribunal made its decision assuming that the divorce had a legal existence, although that was not the case at the primary decision stage. However, the Tribunal simply leaves one guessing on that point.

When the above factors are added to what I have already found constitutes, in my view, error of law and failure to comply with s 363, one gains an added degree of satisfaction that the administrative decision-making process has not been properly carried out.

FUTILITY

The respondent did not concede that there had been any error of the type which I have found above. By way of an alternative submission, the respondent contended that if I found error of law, it would be futile to remit the matter to the Tribunal for reconsideration. Mr P Booth, counsel for the respondent, submitted that in those circumstances “... the result in all likelihood would be no different”. This was related to his submission that there was “a necessary inference” in the Tribunal’s reasons that Ms Ton and Mr Truong had a mutual commitment to a shared life as husband and wife to the exclusion of all others and that that relationship was genuine and continuing. I disagree. First, I do not think that there is any such necessary inference. I think a fair reading of the Tribunal’s reasons is that it simply did not turn its mind to those matters. Secondly, on the question of futility, the respondent relied on *Suk Hong Yoon v Minister for*

Immigration and Multicultural Affairs (Federal Court of Australia, Branson J, unreported 20 February 1988). That decision is clearly distinguishable. In that case the Tribunal had looked at the wrong regulation but it was inevitable that the application would fail because it was out of time. Similarly, *Rahim v Minister for Immigration and Ethnic Affairs* (Federal Court of Australia, Sackville J, unreported, 28 August 1997, Judgment No. 884 of 1997) is distinguishable because although the Tribunal was found to have erred, it was inevitable that the applicant could not have satisfied the requirements of having the occupation of a “trade”. The third case on futility, upon which the respondent relied, was *Yuk Shan Cheung v Minister for Immigration and Ethnic Affairs* (Federal Court of Australia, Einfeld J, unreported, Judgment No. 1343 of 1997). In that case, even though error of law was identified, the matter was not remitted to the Tribunal because there was no additional fact finding to be undertaken.

In the present matter my opinion is that the Tribunal did not ask itself the right questions. It is not sufficiently clear to me that if it did ask the right questions, it would necessarily come to the same conclusion. I think it should be sent back to a differently constituted Tribunal for a fresh assessment. There will be orders accordingly.

I certify that this and the preceding twelve (12) pages are a true copy of the Reasons for Judgment of Justice Carr.

Associate:

Date: 20 March 1998

Counsel for the applicant:	Mr T Hurley
Solicitors for the applicant:	Messrs Barlow & Co
Counsel for the respondent:	Mr P Booth
Solicitors for the respondent:	Australian Government Solicitor
Date of Hearing:	5 March 1998
Date of Judgment:	20 March 1998

